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No. 86-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARL WHORTON, KEN WHORTON, *et al.*,
Petitioners,

v.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC., FORT WORTH CAB & BAGGAGE CO., INC., CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS, CITY OF IRVING, TEXAS, CITY OF GRAPEVINE, TEXAS,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

The private taxi company respondents assert, as stated in their issue on p. i, and argued on pp. 22-24, that the district court dismissal was based upon "an *independent* and alternative ground" (emphasis added). This assertion is incorrect. The district court's dismissal of the private defendants under the *Noerr-Pennington* doctrine in Part III of the opinion was *dependent* upon the conclusion of law reached in Part

1A and B. That conclusion of law was that the Cities and Joint Airport Board had the power and authority under state law by contract to create a ten county regional taxicab monopoly over transportation through territory not subject to their regulatory power during the period 1974 to 1979. If the district court was wrong in that conclusion of law in Part IA and B, and the Cities and Joint Airport Board therefor had incomplete power, incomplete authority, incomplete jurisdiction under state law to do what they did in creating the deadheading monopoly during 1974 to 1979, then the district court utilized an erroneous state substantive law standard in granting the summary judgment motion based on the *Noerr-Pennington* defense. In addition, Part II of the district court's opinion shows unequivocally that the district court held that if the court's conclusion in Parts 1A and B was wrong, then the private defendants could be liable for damages, implying that *Noerr-Pennington*, as discussed in Part III, would be no defense. The ruling in Part III was necessarily dependent upon a correct ruling in Part IA and B and must be reexamined if the ruling on substantive law in Part IA and B is incorrect. See *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).[1]

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[1] The district court granted summary judgment upon the limited discovery record permitted for the class hearing and denied Whorton any further direct discovery on the merits. Even so, the Whorton plaintiffs, unlike the Dallas Taxi Association plaintiffs, vigorously argued to the district court and to the Fifth Circuit that there was substantial evidence of sham, rigged bidding in the record. However, both the district court and Fifth Circuit adopted the view of the defendants, as supported by the Taxi Association plaintiffs, that there was no substantial dispute as to the facts. See Part II, *infra*.

II.

The briefs of all respondents, as does the opinion of the district court, seriously misstate the position of the Whorton plaintiffs by attributing to them the specious "regulatory void" and "ownership" arguments, and other defaults and concessions made by the Dallas Taxi Association plaintiffs. To the contrary, the Whorton plaintiffs have always argued that the Cities and Board usurped the State Railroad Commission power in territory outside the territory of the Cities and Board. (See *infra,* n. 2) The Dallas Taxi Association is an association chartered by the defendant Yellow Cab Co. and was designated as the class representative by the district court in an attempt to exclude the Whortons' lawyers and representation from the litigation. *Woolen v. Surtran Taxicabs,* 684 F.2d 324 (5th Cir. 1982). After reversal, the district court continued functionally to ignore the Whortons and to treat the Dallas Taxi Association plaintiffs as the true plaintiffs, when the reverse is true. The substantial defaults throughout this litigation by the Dallas Taxi Association and other designated class representatives continue in this Court by the absence of a petition for certiorari by them. *Cf. Hansberry v. Lee,* 311 U.S. 32 (1940).

III.

The private taxi company respondents argue in point II of their brief that state legislation pre-existing 1983 shows "the Legislature Contemplated the Acts Complained Of." (p. 28) This argument, as does the opinion of the district court, begs the essential question: Acts *by whom?* Assuming that prior to 1983 the Texas Legislature had delegated to the State Rail-

road Commission regulatory power to create a ten county regional taxicab monopoly over transportation through the territories not within city or airport boundaries, this unexercised state power in no way implied that the Cities and Joint Airport Board had the power to usurp that authority during the period 1974 to 1979.

This same argument made here now by the private taxi company defendants was rejected by Judge Patrick Higginbotham when he ruled in 1978 that the fact that the Texas State Railroad Commission had issued a certificate of convenience to the defendants to operate was no evidence of State intent, under the state action doctrine, to validate the monopoly contract deadheading scheme created by the Cities, Joint Airport Board and private defendants. *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1032, 1033 (N.D. Tex. 1978).[2]

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[2] The three City-Respondent briefs here could not escape inconsistency with the private taxicab companies' response brief on this central issue because the cab companies have already obtained a state court adjudication that the State retained power in its Railroad Commission until 1985 (Private Taxi Response Brief, p. 21). The City Respondents mounted a massive but successful lobbying effort to moot the appeal of that state court opinion and have the state relinquish all control and grant the Airport Board full authority over airport taxis. (Taxi Response Brief, p. 22).

The Parties' briefing shows that the state legislative history consistently rejected the taxi monopoly, first by maintaining some state control during the time of the anti-trust violations alleged herein, and when, after the institution of this suit, the cities began a consistent history of opposing the taxi monopoly, the legislature favored the cities changed policy of opposing monopolies and relinquished full authority to them in 1985.

Judge Higginbotham's 1978 ruling became the law of the case governing the DFW Airport. In response to his ruling, the defendants eliminated the required deadheading and instituted a pickup fee for all cabs. Further, in order to escape from the antitrust damage claim for the period 1974-79, permitted by Judge Higginbotham's 1978 ruling, the defendants obtained passage of the language in the 1983 legislation "validating" the 1974-1979 contract. Thus the 1983 retroactive "validation" legislation in light of Judge Higginbotham's law of the case,[3] was essential to infuse the 1974-79 contract, not originally authorized by state law, with authority. Far from being surplusage, the district court's literal language stating "the [1983] validation statute *itself*, . . . by validating and confirming the contracts in question, is an adequate indication [of state policy]" [emphasis added], 615 F. Supp. at 349, 801 F.2d at 163, is both essential to the ruling and employs a seriously erroneous standard of federal law.

This case holds no international implications. The antitrust violations by these respondents affect only

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[3] The Fifth Circuit's 1985 ruling in the Houston Airport case, *Independent Taxicab Drivers Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir.), *cert. denied*, ___ U.S. (1985) was careful to avoid mentioning Judge Higginbotham's published 1978 opinion in the DFW case and did not overrule his opinion and the rule of the case governing the DFW regional airport. The Fifth Circuit in the Houston case did not address the 1983-85 Texas legislation because that legislation was directed exclusively to ending the monopoly at the DFW joint regional airport. Unlike cab service at the Houston airport and City of Houston, whose territorial boundaries are self-contained, the taxicab transportation to and from DFW passed through multiple counties and necessarily implicated the power, authority and jurisdiction of the Texas State Railroad Commission.

the domestic market place. Therefore traditional antitrust standards should prevail.

IV.

The issues raised by Whorton Petitioner's challenge here to the interpretation and application to the Local Government Antitrust Act are fairly within the scope of the plain error in the district court's legal analysis apparent on the face of its opinion and within the scope of the Petitioner's multiple arguments for equitable relief to the Fifth Circuit.[4] There is no waiver. However, if the States are allowed to grant retroactive immunity to past municipal contracts in violation of federal antitrust law, this second issue may effectively be preempted in the future.

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[4] Whorton's original appeal brief in the Fifth Circuit, pp. 32-36, pp. 45-48, reply brief, pp. 24-25.

CONCLUSION

For the foregoing reasons and the reasons stated in our petition, the petition for a writ of certiorari should be granted to preserve this Court's standards applicable to domestic antitrust law.

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